Supreme Court, U.S.
FILED
JAN 13 2000

(2)

No. 99-893

In the Supreme Court of the United States

DONALD A. STATLAND AND IRIS R. STATLAND,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lost jurisdiction over petitioners' tax refund suit when petitioners filed a petition in the Tax Court seeking redetermination of the tax deficiency asserted by the Commissioner of Internal Revenue with respect to that same tax year.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 178 F.3d 465. The memorandum opinions and orders of the district court (Pet. App. B1-B6, B7-B17) are unofficially reported at 73 A.F.T.R.2d 93-6195 and 75 A.F.T.R.2d 95-1471.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1999. A petition for rehearing was denied on July 1, 1999 (Pet. App. A15). On September 20, 1999, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including November 28, 1999 (Pet. App. C1). The petition for a writ of

certiorari was filed on November 26, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December 1992, petitioners filed a complaint in the United States District Court for the Northern District of Illinois seeking a refund of income taxes paid for the 1976 tax year. While that complaint was pending, the Commissioner of Internal Revenue issued a notice of deficiency to taxpayers asserting an income tax deficiency for that same year. Pursuant to Section 7422(e) of the Internal Revenue Code, 26 U.S.C. 7422(e), the district court stayed proceedings on the refund suit during the 90-day period in which petitioners were entitled to petition the Tax Court for a redetermination of the deficiency. During the period of that stay, petitioners filed a timely petition in Tax Court for the redetermination of their 1976 income tax liability (Pet. App. A1).

The district court thereafter granted the motion of the United States to dismiss the refund suit for lack of jurisdiction under 26 U.S.C. 7422(e). The court held that, under this statute, when petitioners filed their Tax Court petition seeking a redetermination of their tax liability for 1976, the district court lost jurisdiction over the refund suit for that same tax year. Pet. App. A2.

2. The court of appeals affirmed (Pet. App. A1-A14). The court rejected petitioners' contention that, notwithstanding 26 U.S.C. 7422(e), a district court retains jurisdiction over a refund suit when, as here, the notice of deficiency that gave rise to the Tax Court proceeding involved an adjustment other than the adjustments at

issue in the refund suit.[1] The court noted that, under 26 U.S.C. 7422(e), the district court refund suit must be dismissed whenever a Tax Court proceeding for the same tax year is commenced "prior to the hearing" of the refund suit. Although the notice of deficiency in this case was not issued until after the parties had appeared for status conferences on the refund suit in district court, the court of appeals concluded that those preliminary matters were "prior to the hearing" of the refund suit on the merits and did not sustain continuing jurisdiction over the refund suit in district court. Pet. App. A8. In the present case, an "actual trial" had not occurred on the refund claim and, indeed, "not one of the substantive legal issues raised in [petitioners'] district court case was considered by the court" (*ibid.*).

The court of appeals also rejected the assertion that the dismissal of the district court refund suit deprived petitioners of a constitutional right to a jury trial. The court noted that petitioners could have obtained a jury trial by electing to proceed with the refund suit instead of filing the Tax Court petition (Pet. App. A14).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Under Section 7422(e) of the Internal Revenue Code, if a taxpayer seeks review of a deficiency in Tax

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[1] The notice of deficiency was based on a reduction in a 1979 net operating loss that petitioners sought to carry back to the 1976 tax year. The district court refund suit involved adjustments to taxpayers' distributive share of partnership income and their entitlement to an additional exemption for a dependent for the 1976 tax year. Pet. App. A2-A4.

Court "prior to the hearing" of an income tax refund suit brought by that taxpayer in district court with respect to the same tax, the district court in which the refund suit is pending "shall lose jurisdiction" of the refund suit. 26 U.S.C. 7422(e). The pending refund issues, along with the additional issues presented by the notice of deficiency, are then adjudicated in the Tax Court. *Ibid.* See 26 U.S.C. 6512(b).

This statutory scheme gives "the taxpayer an option, once he has received a ninety day deficiency notice from the Commissioner, to petition the Tax Court for redetermination of the asserted deficiency or to refrain from filing such a petition and, having paid the alleged deficiency in full, proceed in the District Court on its suit for refund." *United States* v. *Joe Graham Post No. 119, American Legion*, 340 F.2d 474, 476-477 (5th Cir.), cert. denied, 382 U.S. 824 (1965). As this Court has explained, "in the rare case where the taxpayer brings suit in a District Court and the Commissioner then notifies him of an additional deficiency," this statute provides the taxpayer with "the option of pursuing his suit in the District Court or in the Tax Court, *but he cannot litigate in both.*" *Flora* v. *United States*, 362 U.S. 145, 166 (1960).

That holding applies directly here. When petitioners filed their petition in the Tax Court, that court acquired jurisdiction to determine their claim for refund and the district court "los[t] jurisdiction" over the refund claim at that time. 26 U.S.C. 7422(e). See 26 U.S.C. 6512(b).

2. Petitioners err in contending (Pet. 14, 19-23) that the district court retains jurisdiction over a refund suit that raises different issues than those raised by the Commissioner in the notice of deficiency that gave rise to the Tax Court proceeding. That contention is based on the incorrect proposition that the "subject matter"

over which the Tax Court acquires jurisdiction is limited to the issues raised by the notice of deficiency (Pet. 20). When a taxpayer files a timely Tax Court petition, "the Tax Court acquires jurisdiction over the entire cause of action, necessarily including all possible issues controlling the determination of the amount of tax liability for the year in question whether or not raised by the deficiency notice." *Finley* v. *United States*, 612 F.2d 166, 170 (5th Cir. 1980). Congress has thus authorized the Tax Court to award a refund of any "overpayment" of tax made for the "same taxable year" involved in the notice of deficiency. 26 U.S.C. 6512(b)(1). See 26 U.S.C. 6512(b)(2).

A taxpayer's total income tax liability for each taxable year constitutes a single, unified cause of action regardless of the variety of contested issues that may bear on the final computation. *Commissioner* v. *Sunnen*, 333 U.S. 591, 598 (1948); see *Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 359, 366 (1931). The courts have thus consistently held that, under 26 U.S.C. 7422(e), when a taxpayer elects to seek relief in the Tax Court, the district court loses jurisdiction to adjudicate the taxpayer's refund suit involving the same taxable year. *Finley* v. *Commissioner*, 612 F.2d at 170; *United States* v. *Joe Graham Post 119, American Legion*, 340 F.2d at 477; *Russell* v. *United States*, 592 F.2d 1069, 1071 (9th Cir.), cert. denied, 444 U.S. 946 (1979); *Dorl* v. *Commissioner*, 507 F.2d 406, 407 (2d Cir. 1974).[2]

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[2] As the legislative history of Section 7422(e) explains in detail:

> The result under subsection (e) is to give jurisdiction over the cause of action to only 1 court (2 courts may acquire jurisdiction under existing law), and to give the taxpayer the choice of which court shall have jurisdiction. The taxpayer, by filing a petition in the Tax Court, would cause that court to have sole

Petitioners err in asserting (Pet. 21) that the decision in this case conflicts with the decision in *United States* v. *Joe Graham Post 119, American Legion, supra.* That case did not hold, as petitioners contend, that "issues not challenged in the taxpayer's Tax Court petition remain[ed] within the jurisdiction of the United States District Court" (Pet. 21). In the *Joe Graham* case, the taxpayer had instituted a refund suit in district court concerning the fiscal year ending June 30, 1961. 340 F.2d at 476. While that refund suit was pending, the Commissioner issued a notice of deficiency for several calendar years, including the calendar year ending December 31, 1960. *Ibid.* The question addressed in that case was whether 26 U.S.C. 7422(e) divested the district court of jurisdiction over the refund claim for the fiscal year July 1, 1960 through June 30, 1961, which *overlapped* for a six-month period with the calendar year January 1, 1960 through December 31, 1960, that was before the Tax Court. 340 F.2d at 476. The critical question in that case was whether the fiscal or the calendar year was the correct accounting period. *Ibid.* The court stated that *if* the correct accounting period was the calendar year—the period for which the notice of deficiency had been issued and the Tax Court's jurisdiction invoked—the Tax Court would have acquired jurisdiction over that entire year and the district court would be divested of jurisdiction. *Id.* at 476-478. If, however, the correct accounting period was the fiscal year, the court concluded that the

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jurisdiction, or, by failing to file a petition in the Tax Court, would cause the district court or the Court of Claims to have sole jurisdiction.

S. Rep. No. 1622, 83d Cong., 2d Sess. 611 (1954). See also H.R. Rep. No. 1337, 83d Cong., 2d Sess. A431 (1954).

Tax Court would lack jurisdiction over the subject matter of the refund suit. *Ibid.* Thus, once the proper tax year was determined, one court would possess jurisdiction over all issues relating to the liability for that year. See *ibid.* The court concluded in the *Joe Graham* case that the Tax Court had jurisdiction to make this determination of the correct accounting period because, by filing a Tax Court petition, the taxpayer had placed that issue before that court. *Id.* at 476. Neither the holding nor the reasoning of *Joe Graham* supports petitioners' position in this case.

Petitioners err in relying (Pet. 22) on *Hemmings* v. *Commissioner*, 104 T.C. 221 (1995). In *Hemmings*, the taxpayers asserted in the Tax Court that the Commissioner was barred from determining a deficiency in respect of the 1984 tax year because a final judgment had been entered in the district court on a refund suit for that year. The Tax Court stated that 26 U.S.C. 7422(e) did not apply to that case because the notice of deficiency was issued after the refund suit had gone to judgment. 104 T.C. at 229-230. The Tax Court further noted that, while 26 U.S.C. 6212(c) bars the Commissioner from issuing a second notice of deficiency for the same year after the taxpayer has petitioned the Tax Court with respect to the first notice of deficiency for that year, "[t]he filing of a refund action in the District Court or the Claims Court * * * does not statutorily bar the Commissioner from issuing a notice of deficiency for the same taxable year pursuant to section 6512(a)." 104 T.C. at 230. The Tax Court thus concluded in *Hemmings* that there was no statutory bar to the assertion of the additional deficiency by the Commissioner. The court further noted that neither *res judicata* nor collateral estoppel precluded the Commissioner's action, for it is well established that the

government's claim for unassessed additional taxes is not a compulsory counterclaim in a refund suit. See *id.* at 234-235. These holdings have no relevance to the question presented in this case.[3]

3. By requiring dismissal of the district court action when the Tax Court proceeding is commenced "prior to the hearing" of the case in the district court, 26 U.S.C. 7422(e) divests the district courts of jurisdiction over claims that have not been heard on the merits or have not proceeded to "actual trial." S. Rep. No. 1622, 83d Cong. 2d Sess. 611 (1954); H.R. Rep. No. 1337, 83d Cong., 2d Sess. A431 (1954); *Brown* v. *Commissioner*, 71 T.C.M. (CCH) 2301 (1996). The court of appeals correctly concluded that the status and scheduling conferences that had been conducted in the district court before the Tax Court petition was filed did not bar application of the statute in this case. As the court stated, the district court action was properly dismissed under 26 U.S.C. 7422(e) because, before the notice of deficiency was issued, "not one of the substantive legal issues raised in the [taxpayers'] district court case was considered by the court." Pet. App. A8.

Contrary to petitioners' contention (Pet. 14, 25), that holding does not conflict with the decision of this Court in *Federal Deposit Insurance Corporation* v. *Mallen*, 486 U.S. 230, 247-248 (1988). That case did not concern the meaning of the term "hearing" (or any other term) in 26 U.S.C. 7422(e). Instead, it concerned the constitutionality of a statutory provision that authorized the

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[3] Petitioners similarly err in relying (Pet. 22-23) on the dissenting opinion of Judge Beghe in *Estate of Mueller* v. *Commissioner*, 107 T.C. 189, 236-237 (1996), aff'd, 153 F.3d 302 (6th Cir. 1998). That case did not concern the application of 26 U.S.C. 7422(e). Instead, it addressed the proper application of the doctrine of equitable recoupment. 107 T.C. at 192.

Federal Deposit Insurance Corporation to suspend from office an indicted official of a federally insured bank. 486 U.S. at 235-236. The Court rejected the contention that the statute involved in that case violated the Due Process Clause because it did not guarantee an opportunity to submit oral testimony at a post-suspension hearing. *Id.* at 235. Nothing in that decision in any manner addresses, or has relevance to, the proper construction of 26 U.S.C. 7422(e).

Other cases cited by petitioners are similarly inapposite. For example, *United States ex rel. Stinson* v. *Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991), and *Menard* v. *Bowman Dairy Co.*, 15 N.E.2d 1014, 1015 (Ill. App. Ct. 1938), on which petitioners rely (Pet. 25), do not address the meaning of the term "hearing" in 26 U.S.C. 7422(e). In *Stinson*, a law firm brought suit against an insurer under the *qui tam* provisions of the False Claims Act. 944 F.2d at 1151. That Act precludes *qui tam* actions stemming from allegations or transactions disclosed publicly in a civil hearing. 31 U.S.C. 3730(e)(4)(A). The district court had dismissed the *qui tam* action for lack of jurisdiction because it was based on information obtained during civil discovery in another case. The court of appeals affirmed, and in doing so rejected the contention that the term "hearing" in the *qui tam* statute did not encompass a civil "proceeding" or civil litigation. 944 F.2d at 1155. Nothing in that decision has relevance to this case.

The decision in *Menard* concerned the application of an Illinois statute that provided that a plaintiff may dismiss an action without prejudice "at any time before trial or hearing begins" but thereafter may dismiss only upon the filing of a stipulation signed by the defendant or pursuant to an order of the court made on special motion and supported by affidavit. 15 N.E.2d at 1015.

The court held that the term "hearing" in the statute applied to hearings before a Master of Chancery. That decision provides no guidance to the interpretation of 26 U.S.C. 7422(e).

4. There is no merit to petitioners' assertion (Pet. 15-18) that dismissal of their refund suit violates their constitutional right to a jury trial. The Seventh Amendment preserves the right to a jury trial "in suits at common law"; this constitutional right to jury trial does not apply to civil actions against the United States. *McElrath* v. *United States*, 102 U.S. 426, 440 (1880); see 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2314, at 111-116 (2d ed. 1995 & Supp. 1999). A right to jury trial exists for civil actions against the United States only when a statute so provides. See *Wickwire* v. *Reinecke*, 275 U.S. 101, 105 (1927). Petitioners' claim of a constitutional right to a jury trial of tax refund issues is therefore incorrect and has consistently been rejected by the courts. See, *e.g.*, *Coleman* v. *Commissioner*, 791 F.2d 68, 70 (7th Cir. 1986); *Hudson* v. *United States*, 766 F.2d 1288, 1292 (9th Cir. 1985); *McCoy* v. *Commissioner*, 696 F.2d 1234, 1237 (9th Cir. 1983); *Blackburn* v. *Commissioner*, 681 F.2d 461 (6th Cir. 1982); *Mathes* v. *Commissioner*, 576 F.2d 70, 71 (5th Cir. 1978), cert. denied, 440 U.S. 911 (1979).

Under 28 U.S.C. 2402, a tax refund suit may be tried to a jury if either party requests it. Nothing in the application of 26 U.S.C. 7422(e) to this case deprived petitioners of this statutory right to a jury trial. As the court of appeals emphasized (Pet. App. A14), petitioners could have maintained their action in the district court and thereby exercised their statutory right to a jury trial simply by electing not to file a Tax Court

petition.[4] See *Olshausen* v. *Commissioner*, 273 F.2d 23, 27 (9th Cir. 1959), cert. denied, 363 U.S. 820 (1960). It was by their own election to file a Tax Court petition that petitioners foreclosed their opportunity to seek an alternative form of judicial determination of their refund claim. See *First National Bank of Chicago* v. *united States*, 792 F.2d 954, 955 (9th Cir. 1986), cert. denied, 479 U.S. 1064 (1987); *Solitron Devices, Inc.* v. *United States*, 862 F.2d 846, 848 (11th Cir. 1989).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2000

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[4] In *The Pfeiffer Co.* v. *United States*, 518 F.2d 124, 129 (8th Cir. 1975), the court noted that, when the Commissioner of Internal Revenue issues a notice of deficiency with respect to the same taxable year for which a refund suit is pending, if the taxpayer does not file a petition for redetermination of the deficiency in the Tax Court, the taxpayer may pay the deficiency, file a second refund suit in the district court and move to consolidate the refund suits pursuant to Rule 42(a) of the Federal Rules of Civil Procedure.